

# Are You Prepared to Defend Yourself From A Lawsuit Caused By An Agency Nurse?

Most skilled nursing facilities do not have vendor contracts with nursing temp agencies; yet nearly every facility will have a contract with the vendor who maintains the grounds. If you have to choose one vendor between the two to engage without a contract, choose the latter and not the former. First among all vendors who create the most exposure for you and your residents is the nursing temp agency.

If you have developed and implemented a compliance program to address fraud and abuse, a vendor contract with a nursing temp agency is critical. It is only by contract that you can bind the agency to take the same precautions that you are taking with your own nursing personnel; e.g.; criminal background checks; adherence to licensure requirements; monitoring nurses continued eligibility to participate in federal health care programs; on-going compliance training and participation in your compliance program. These needs are now becoming compounded with patient confidentiality (HIPAA) requirements.

## Legal liability of the nursing home

A nursing home can be held legally liable under two tort theories for its use of agency nurses: (1) *respondeat superior* and (2) corporate negligence.

1. *Respondeat superior*: this theory is a form of vicarious liability that imposes legal responsibility for the acts or omissions of one person on another person or entity because of the relationship of the negligent person to the person or entity who is held vicariously liable. A nursing home must be deemed by a court to be the employer of the agency nurse if the nursing home is to be held legally liable for the acts or omissions of an agency nurse. Determination of who acts as the actual employer of the agency nurse depends upon who has the right to actually control the agency nurse with respect to the work in question and whose business purpose was being carried out by the nurse at the time of the nurse's negligence. As a result, if the temp nurse negligently acts or fails to act when she has a duty to act while working at the nursing home, the nursing home may be held vicariously liable for any damages that result from the nurse's negligence.
2. Corporate negligence: this theory imposes a direct duty on the nursing home to exercise due diligence in preventing incompetent nurses from practicing at the nursing home. Policies and procedures must be developed and implemented to assure quality care for the residents. A nursing home's responsibilities include, among others: exercising ordinary care in choosing its nurses; carefully reviewing all nurse qualifications and credentials; monitoring each nurse's performance; and taking corrective action once a nurse is determined to be incompetent. If a nursing

home is to avoid legal liability for tortuous behavior by its nursing staff, it must evaluate and choose its nurses carefully, whether hired directly or indirectly through a temporary nursing agency. If the nursing home does not hire carefully, and a nurse from a temporary nursing agency commits a tortuous act with respect to a resident, the nursing home may be held liable under a corporate negligence theory.

### **Minimizing legal liability when using temporary agency nurses**

A nursing home cannot avoid all responsibility for a temp nursing agency nurse because the nursing home has a duty to supervise and assume responsibility for its employees and has a duty to deliver appropriate care to its residents. The nursing home can, however, manage its share of the risk, apportion that risk that can not be avoided, and avoid unnecessary risk by entering into a contract with a temporary nursing agency. A contract should be developed by experienced legal counsel and should include, at a minimum, the following components:

- Key terms must be identified and defined.
- Responsibilities, duties and objectives for both parties must be specifically identified.
- The nursing temp agency must be required to take responsibility for adhering to any state and federal laws and regulations, as well as JCAHO standards if applicable, that apply.
- Agreement must be reached and articulated on the hiring policies and standards of the temp nursing agency.
- Termination rights must be clearly articulated.

In addition to entering into a contract with the temp nursing agency, the nursing home should assess the qualifications of the agency with respect to its hiring standards, ongoing requirements for training its staff and other business practices.

It is only by articulating these, among many other, key aspects of your relationship with your nursing temp agency that you can be assured maximum protection. In order to care for your most precious asset, your residents, you must control in advance, via contract, the behavior of the personnel from the nursing temp agencies who provide care for your residents.

Visit other areas of our website for an overview of our services, our experience and our attorney profiles